In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. . . . . .

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,
a Taxpayer,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

BRIEF OF PETITIONER.

The opinion of the Court in this cause on the hearing on the merits is reported in 144 O. S. 64, Ohio Bar Association Report, August 14, 1944; 56 N. E. Rep. (2nd) September 20, 1944, p. 265. (pp. 953, 963, R. Vol. 3.) Opinion of the Court of Appeals in Case No. 3325, *State ex rel. Foster v. Evatt, Tax Commissioner,* is attached hereto.

No opinion was handed down on the denial of the application for rehearing. The action and order of the Court is found on p. 909, R. Vol. 3.

No opinion was rendered on the motion to vacate. The action and order of the court appears on Record, page 910, Vol. 3.

I.

THE PECUNIARY INTEREST OF JUDGE TURNER RENDERS THE COURT INCOMPETENT. ITS ACTION VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first question to be considered by this Court is that which relates to alleged disqualification of Judge Turner,

who wrote the opinion and whose concurrence was necessary to a judgment by a majority of the court as required by the constitution of Ohio, Article IV, Section 2.

The petitioner set up the claim that "disqualification arising out of a pecuniary interest as set forth in the motion and affidavit of relator filed herein, taken in conjunction with the record, transcript, decision of this Court and judgment rendered herein results in denying plaintiff-appellee due process of law and the equal protection of the laws violative of the 14th Amendment to the United States Constitution." (p. 920, R. Vol. 3.)

The motion of the plaintiff-appellee and the affidavit in which such facts are set forth are to be found (pp. 923-929, 945-950, 973-978, R. Vol. 3). Judge Turner's affidavit is found (pp. 920, 930, 941, 942, R. Vol. 3).

The facts with reference thereto are stated briefly in the petition herein. They are these:

Judge Turner was a lessor of the Kroger Grocery Company in 1935 and every year since. He was a lessor of the R. & S. Dime Stores in 1936 and every year since. The rent stipulated in each lease provides that the lessor shall be paid 5 per cent of the gross receipts derived from sales of the vendor.

Judge Turner disclosed the existence of the Kroger lease at the time the case was called for hearing on the merits March 21, 1944. The case was called ahead of its order on the docket. The case set for hearing at 9 o'clock a.m. was passed because of absence of counsel.

When this case was called, chief counsel Matthew L. Bigger had not yet arrived at the Court Room, the Court being so advised. This case was previously set as the second case and in ordinary course would be heard at 10 o'clock a.m. but was called at 9 a.m.

Judge Turner then disclosed his interest in the Kroger lease as stated. Thereafter said chief counsel arrived just after the Attorney General for appellant Evatt opened his

argument. He was not advised of the interest of Judge Turner as disclosed at that hearing until after the case was argued and submitted to the court and the parties had left the court building. This is undisputed.

There is no dispute about the facts as to the percentage base of the lease from Judge Turner to either of such lessees. There is no dispute of the fact that only the lease of the Kroger Company was disclosed at the opening of the hearing March 21, 1944.

The record shows that the tax collections were mingled with the receipts from sales of the vendors. It necessarily follows, that such lessors as Judge Turner, are benefited financially where such vendors do not keep records of each specific individual sale. *By reason of the amounts of taxes paid by consumers to the Kroger Company being mingled with the payments by those consumers to the Kroger Company for merchandise, Judge Turner is given a pecuniary interest. Such interest renders him and the court incompetent. That disqualifies him. The basis of that disqualification is public policy. Where public policy is the basis the disqualification is not personal to plaintiff and cannot be waived, and a judgment rendered by such a court is void.*

Whether void or voidable, it will always be set aside where attacked directly as it was here. If the offending court or Judge fails to act and persists in participating in such a judgment the appellate court has always set it aside. It denies due process of law. It denies the equal protection of the laws. It strikes at the very foundation of the administration of justice.

Here the offense was committed by a Judge of the Supreme Court and by the majority of the court. His action was necessary to constitute a majority.

Chief Justice Marshall of this Court in a very early case recognized the existence of this principle and the maxim underlying the principle "that no man can be a Judge in his own case."

Of the magistrate in *Slacum vs. Sims*, 5 Cranch (U. S.) 363 p. 367, Chief Justice Marshall said:

> "He is directly interested and his interest appears on the record * * * The discharge being granted by an incompetent court is wholly void."

The magistrate was liable on a bond with Sims, one of the parties. He discharged the party so liable and received a conveyance from Sims of his property.

If the judgment rendered by such a court is void, or if rendered by an incompetent court the action offends the 14th Amendment to the United States Constitution. *Tumey vs. Ohio*, 273 U. S. 510, 523.

The offense or error is committed by the Court itself. It should take cognizance of the limits of its own jurisdiction. If it does not the error will be available in the Court to which the party must appeal to seek relief. There is no other avenue of relief or protection for the petitioner herein, because the Supreme Court of Ohio is the court of last resort.

> "A plaintiff may assign error for want of jurisdiction in that court to which he has chosen to resort."
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> P. 126. "Here it was the duty of the Court to see that they had jurisdiction for the consent of the parties could not give it."
>
> "It was therefore an error of the Court and the plaintiff had a right to take advantage of it."
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> *Capron vs. Van Noorden*, 2 Cranch (U. S.) 125-126.

The reason that the court is incompetent and the judgment is contrary to public policy is expressed by the following decision:

Oakley vs. Aspinwall, 3 N. Y. 547:

> "In every grant of judicial power an exception is implied that a Judge shall not sit where he is interested * * *"

That court said p. 550 that "It is presumed he will act in his own interest."

This doctrine is approved by the Supreme Court of Ohio in Gregory vs. R. R., 4 O. S. 675. The court in that case in approving failure of counsel to cite cases bearing on this matter said the reason was,

> P. 679: "In but few cases do interested judges ever pretend to sit in such cases."

The rule in such cases is discussed in *Cooley on Const. Limitations*, 6th Ed., p. 509; 8th Ed. Vol. 2, p. 874.

> "To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.
>
> "Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in the appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

The following cases are cited:

Queen vs. Justices of Suffolk, 18 Q. B. 416;
Queen vs. Justices of London, 18 Q. B. 421;
Peninsular Co. vs. Howard, 20 Mich. 18.

On the question whether it can first be raised in appellate court we cite in addition to the above the following:

Richardson vs. Welcome, 6 Cush. 332;
Dimes vs. Proprietors of C. J., 3 H. L. Cas. 759;
Oakley vs. Aspinwall, 3 N. Y. 547;
Queen vs. Justices of Hertfortshire, 6 Q. B. 753.

Dimes vs. Proprietors etc., 3 H. L. C. 759. The Lord Chancellor had an interest as a shareholder in the plaintiff company.

Cause first heard by Vice Chancellor.

Heard on appeal before Lord Chancellor who affirmed.

Held Lord Chancellor was disqualified and his decree was reversed, but the decree of the Vice-Chancellor was affirmed since he had no interest and the appeal dismissed.

State vs. Crane, 36 N. J. L. 394—A proceeding to lay out a road. Assessments were to be made by a Board of Commissioners of Highways. One of the Commissioners was interested and participated in making the assessment. Held *this invalidated the assessment, even though there was a majority of the Commissioners who were competent to act without his vote. This was in obedience to the legal maxim that no judge can sit in his own case.*

Taylor vs. County Commissioners, 105 Mass. 225:

> "As one of the County Commissioners was a brother-in-law of Bullard, over whose land the highway was located, and who was entitled to damages, the proceeding was *coram non judice* and utterly void, and no subsequent waiver, consent or release could render it valid."

The foregoing is the opinion in full on issuance of certiorari.

Peninsular Ry. vs. Howard, 20 Mich. 18. A suit to assess damages in condemnation suit. One of the jurors was a stockholder in the Railway Company. *Held verdict void.*

Stockwell vs. Township Board, 22 Mich. 341:

> "A proceeding before the township board to remove an officer of a school district, is in the nature of a ju-

dicial investigation; and when one of the board is interested in the subject of the complaint, and *the presence of such member is essential to the quorum,* the proceedings are void."

Kentish Artillery vs. Gardiner, 15 R. I. 296. An action in trover for conversion of a uniform belonging to plaintiff. Defendant pleaded in abatement to the jurisdiction on the ground that the justice was a member of plaintiff company.

Held, that he was disqualified by his interest in the subject matter of the suit, and could not take jurisdiction of the case.

Lee vs. British American Company, 51 Tex. Civ. App., Syll. No. 5:

"An allegation that the judge trying the case was disqualified by interest in the property involved, and by having been an attorney in the litigation affecting it, is sufficient to show the judgment to be *void,* and not merely *voidable*; and a demurrer thereto was properly sustained."

The following is quoted from the opinion:

"And *although it does not appear from the record that any objection was urged to his disqualification at the time the judgments were entered, it is held to be a question that affects the jurisdiction and power of the court to act, and one which cannot be waived. City of Dallas vs. Peacock,* 89 Tex. 60-63."

That the interest of a judge financially, however remote, renders a judgment—rendered by or through him, void, see the following:

"Syllabus, p. 101: Where a probate judge had a valid claim against an estate, but had determined in his own mind, not to enforce his claim, and exercised jurisdiction over the estate, and granted letters of administration, it was held nevertheless that he was interested as a creditor, and that *the grant of administration was therefore void for want of jurisdiction.*"

P. 106. "The fact there was no exception taken" cannot aid the case.

"It is a general rule that want of jurisdiction, especially of a court of limited and special jurisdiction, cannot be aided by any waiver of exceptions or even by consent."

Signourney vs. Sibley, 21 Pick. (Mass.) 101-106.

"An objection on the grounds of interest of a judge affects the administration of justice; the motion to dismiss is in the nature of an exception to the magistrates jurisdiction and *may be taken at any time.*"

Richardson vs. Welcome, 6 Cush. (Mass.) 331-333.

P. 221. "The provision of Art. 29-7 of our declaration of rights, that 'it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,' rests upon a principle so obviously just and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates a judge in any matter in which he has any pecuniary interest or in which a near relative or connection is one of the parties. *It applies to civil as well as criminal causes*; not only to judges of the Courts of Common Law and Equity and Probate, but to special tribunals, and to persons authorized to decide between parties in respect to their rights. It existed under the common law from the earliest times."

P. 224. "The defect is incurable. It does not depend on the motives with which the judge acted * * *, but it is said by Chief Justice Shaw in *Gay v. Minot,* 3 Cush., 352, 354, that the case being *coram non judice,* the first probate was not voidable merely, *but void,* incapable of being made good by confirmation, waiver or ratification on the part of those interested."

Hall vs. Thayer, 105 Mass. 219, 221, 224.

The objection to the disqualification can be taken advantage of in the appellate court for the first time. Here it was raised on the record of the offending court.

P. 25. "The maxim that no man shall be judge, in his own case is one deeply rooted in the common law, and can never be overlooked anywhere, where impartial justice is one of the objects of judicial administration. * * *"

"It is not a matter of discretion with the judge, or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all, when he is thus interested or when he may be possibly subjected to temptation. His powers are absolutely subject to this limitation." (*Wash. Ins. Co.*, 6 Price, 2 Hopkins Ch. 2).

"And in a Court composed of several justices of the peace, if one of them is interested in a proceeding before them in which he acts at all, the judgment or determination will be void, though there is a majority in favor of the decision, without counting the interested justice. See *Queen vs. Justices of Hertfordshire*, 6 Q. B. 753, also 18 Q. B. 416, 421. It has been held that the objection is not waived by the neglect of the party to take advantage of it on the first opportunity. *But it may be raised in the appellate court for the first time.* 6 *Cush.* (Mass.) 352; 3 *House Lords Cases*, 787, 21 Pick. (Mass.) 106."

Peninsular Co. vs. Howard, 20 Mich. 18, 25, 26.

"We cannot enter into an analysis of the motives which may have produced (the judgment or order) the decision; it is enough to say that a single interested person formed a part of the court. * * * We must take care that interested parties do not join in deciding cases."

Queen vs. Justices of Hertfordshire, 6 Q. B. 753, 115 Reprint, 284. Lord Denman, C. J.

"The rule (of disqualification of an interested judge) must be made absolute. * * * The presence of the interested judge vitiated the proceedings."

Queen vs. Justices of Suffolk, 18 Q. B. 416, 158 Reprint 156.

P. 640. "By common law a judge must not be a party or otherwise interested. This rule seems to be established out of reasons of public policy and where a judge is interested as a party or otherwise * * * the disqualification cannot be waived by consent of either or both parties, because when the disqualification exists by reason of interest or relationship of the judge, the consent to waive does not remove the disqualification, but the disqualification exists notwithstanding the consent and waiver. It is against the policy of the law to permit a judge who is interested or within the forbidden degree of relationship to sit in the trial of the cause although the parties may consent thereto."

State v. Ham. 24 S. D. 639, pp. 640-641.

II.

THE MERITS OF THE CONTROVERSY.

We cannot know at this juncture whether in the event this Court should allow this petition for writ of certiorari whether the court would merely determine the question of the interest of Judge Turner and therefore the question of the disqualification of Judge Turner to participate in the final consideration and judgment of this cause and in the event of a determination that his interest disqualified him and render the judgment void or voidable, whether the court would in such event give consideration to the merits of the controversy itself, or whether it would in such event remand the case to the Supreme Court of Ohio for reargument. Because we cannot know what action the court will take, or what action it will desire to take, we briefly discuss the merits of the case itself.

The Supreme Court of Ohio by the necessary concurrence of Judge Turner expressed the opinion that the mandate of the Court of Appeals of Franklin County, Ohio, necessarily involved judicial legislation in that there was no provision in the laws of Ohio which permitted the making of any rule or regulation based upon fact finding or which expressly permitted the calculation of the sales tax by an average percentage rate, or which permitted a finding by the Tax Commissioner of the amount of taxes collected unaccounted for "based on any information in the possession of the Tax Commissioner."

In this it is clear that the Supreme Court of Ohio misconceived the character of the mandate of the Court of Appeals. There is nothing in that mandate which calls for any implication or which requires the court to find that the Legislature had omitted something which was necessary to be supplied in order to carry out the mandate of the Court of Appeals. It was not the mandate of the Court of Appeals that the Tax Commissioner be commanded to levy a tax upon these two vendors or fix a rate of tax, but on the contrary to levy an assessment for personal liability against a tax collector, which would be tentative in its nature and which would afford to the vendors the opportunity to petition for a reassessment and for a further inquiry as to the amount of the personal liability due and payable and in the event of an adverse decision against them upon such reassessment, the vendors could have the further opportunity under the affirmative provisions of the statute to appeal to the Court of Common Pleas of Franklin County, Ohio. The error of the opinion of Judge Turner and therefore the error of the Supreme Court's decision lies in the fact that it was assumed that it was commanded to immediately levy a tax and fix the rate and thereafter take summary action as upon such assessment of a tax, while as a matter of fact it was purely tentative having no element of finality even as to the

amount of personal liability and affording every opportunity to the vendors to make further question in the office of the Tax Commission and later in a court of justice. It also afforded the state an opportunity to produce additional evidence after the vendor filed his petition or appeal. The Sales Tax Act, Section 5546-5 gave to the Commission the power to make rules, which would be rules of administration, for the purpose of the proper enforcement of the provisions of the act against vendors and to prevent evasion of the tax as specifically provided in Section 5546-2 and 5 G. C. *The statute further provided, Section 5546-2, that a presumption arises that all sales are taxable until the contrary is established.*

This presumption was lawful and plainly made in order to place upon the vendor the burden of proving an honest accounting where the correctness of his accounting is questioned. It was based upon the principle recognized by all authorities that where the facts reside in the other party, and what is more, where he has under his control the power and remedy for collecting the exact tax and keeping a record thereof, the burden is on him and not on the other party. The recognized purpose of such a statutory presumption is to establish liability against the one in possession of the facts. It afforded him an opportunity for defense after assessment under Section 5546-9a G. C.

Another section of the Sales Tax Act, Section 5546-9a provided that the *Tax Commission be empowered to levy such tentative assessment upon any information, which might come into its possession.* These three sections of the Sales Tax Act are not quoted in this connection because they are fully set out in the summary statement which is found in the first branch of the petition.

Inasmuch as the Supreme Court of Ohio misconceived the character of the mandate of the Court of Appeals and has misconceived the character of the Ohio Sales Tax Act we are of the opinion that it is only necessary to show to

this Court on this appeal the authorities which have sustained the principle.

The Tax Law as enacted, was complete. The policy and standard of action were fixed in the law. See *Mut. Film Co. vs. Ind. Com.*, 236 U. S. 230, 245, 246.

The power to administer and enforce the law was delegated to the Tax Commissioner. That power was as complete as necessary to make the law operative and effective. Everything that was essential to make the tax law operative was enacted by the Legislature.

What was done by the Tax Commission here, when it formulated the rule, was simply the performance of administrative duties, delegated to the Tax Commissioner by law for "the proper administration and enforcement of the provision of the act," Section 5546-2-5-9a. It was a "*filling up of the details*" and in no sense legislation. Both the Supreme Court of Ohio and of the United States have recognized this principle and power as essential to make a law effective in its application and operation.

On this latter point we call the Court's attention particularly to the case of *Wayman vs. Southard*, 10 Wheat. (U. S.) Chief Justice Marshall 1, 43, and *Coady vs. Leonard*, 132 O. S. 329; *Field vs. Clark*, 143 U. S. 649, 693, 694.

The *C. W. & Z. R. R. Co. vs. Com.*, 1 O. S. 77, 88, 94, the court declared in substance that a tax law is complete as was this tax law, i.e. when the levy of the tax was made, and it was specified upon what the levy was made, the rate, who should pay it, when it was to be paid, where it was to be paid and stated the object and purpose of the tax and that the delegation of power to enforce it merely related to its execution. *This necessarily means* as applied to the instant case that power to enforce its collection includes the power to fix a personal liability on a vendor who has full control and power in collecting the tax for the state, as provided in Section 5546-9a G. C.

The court in that case said page 94:

> "The power to command a thing to be done, includes the power to authorize it to be done."

Therefore since the legislature delegated to the Tax Commission the authority and power "to administer and enforce the provisions" and find the amount of personal liability under Section 5546-9a and declared the presumption in Section 5546-2a it required no legislation or implication as contended by the Tax Commissioner, and the Attorney General.

The Court and the Tax Commissioner and his special counsel contend the power to assess evaporated in the process of transfer from the legislature to the Tax Commissioner. 234 U. S. 493, 494, *U. S. vs. Atchison Ry. Co.*

In the case of *Wayman vs. Southard,* 10 Wheat. (U. S.) 1, 43, Chief Justice Marshall said:

> "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

In view of the foregoing, one is compelled to wonder upon what or why the Supreme Court of Ohio reasoned and decided as it did. The opinion of Judge Turner and the judgment of the court resulting as it does in the enforced collections of sales taxes from the public and from every man, woman and child, for public purposes and at the same time exonerating and freeing such tax collectors from any accounting to the state for such taxes and releasing them from any liability therefor, where they brazenly refuse to keep records of their sales, and are upheld by a Tax Commissioner who says that to require vendors to obey the statute and keep such records, would be arbitrary and *unreasonable exercise* of his authority, is so ob-

viously untenable and contrary to the plain provisions of the act and contrary to all authorities that it is a shock to every sense of justice. (pp. 528, 828-831, 545, R. Vol. 3.)

It is clear, however, that in so acting the Court had to violate the most fundamental principle underlying English and American jurisprudence, to-wit:

One cannot be a judge in his own case. If he does so, his action or his participation in action by the court, renders the court incompetent, and violates the 14th amendment.

We cite the following authorities:

Sutherland Statutory Construction, 3rd Ed. Vol. 3, Section 6706;
San Antonio vs. Mehaffey, 96 U. S. 312;
Unity vs. Burrage, 103 U. S. 458;
Debolt vs. Oh. L. Ins. Co., 1 O. S. 564, 566, 567;
Murray's Lessees et al. vs. Hoboken L. Co., 18 How. (U. S.) 272, 275, 277, 278, 280, 282;
Phillipps vs. Conn., 283 U. S. 595, 596, 599;
Helvering vs. Rankin, 295 U. S. 123, 131;
U. S. vs. Atchison Ry. Co., 234 U. S. 491, 493, 494;
Pacific States Box Company vs. White, 296 U. S. 176, 185, 186;
Mut. Film Co. vs. Industrial Com., 236 U. S. 230, 245, 246;
Hampton Jr. vs. U. S., 276 U. S. 404, 408, 409, 412;
N. Y. Cent. Ry. vs. U. S., 287 U. S. 12, 20, 26;
Schechter vs. U. S., 295 U. S. 495, 529, 542;
Cooley on Const. Limitations, 8th Ed. pp. 138, 139, Vol. 1;
Gilbert vs. Craddock, 67 Kans. 346, 72 Pac. 869, 871;
Thompson vs. Consold. Gas Co., 300 U. S. 55, 69-70;
Dooley vs. Penn., 250 Fed. 142, 143;
Sawyer vs. U. S., 10 Fed. (2nd) 416, 420.

In the case of *Panama Refining Company vs. Ryan*, 293 U. S. 388, the court made the following statement at page 421 of the opinion:

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

At page 426 of the opinion the court cited the case of *C. W. etc. Railway vs. Clinton County Commissioners*, 1 O. S. 88.

The Court of Appeals in the instant case and former Chief Justice Marshall as Referee were merely applying the principles above declared.

On the controlling effect of the presumption established in Sec. 5046-2 G. C. which was practically ignored by the court, we cite the following:

Jones vs. Brim, 165 U. S. 180, 184, 185;
Jones Evidence—Civil Cases, Section 11a, 196;
Atlantic C. L. Ry. vs. Ford, 287 U. S. 502, 507, 508;
Bandini vs. Superior, 284 U. S. 19;
Ferry vs. Ramsey, 277 U. S. 88, 94, 95;
Ry. vs. Turnispeed, 219 U. S. 35, 42, 43;
People vs. Osaki, 286 Pac. 1025, 1031;
Wigmore Ev., 4th Vol., Sections 290, 294, 2486;

Harper vs. Highway (Tex.), 89 S. W. (2nd) 448, 449.

It would seem that the present is no time, when the general public are ungrudgingly bearing heavy taxes in state and nation, to meet the exigencies of a critical period in our history, to suffer a gigantic fraud upon the public revenue where the undisputed facts show plainly that such fraud exists and tax collectors are permitted to retain that revenue to the great injury of the state and its citizens.

That may be the evolution of law and justice in this land, but we question it. We prefer to agree with the Court of Appeals in its opinion (p. 71 App.) where it said:

> "The collection of taxes has assumed the greatest importance at this time, and the taxpayer will not be satisfied if he pays in full while others escape a substantial part of the burden."

Respectfully submitted,

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